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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Case No. _____

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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July 23, 1982

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

LOIS GHOLSTON,

Appellant,

vs.

EDWARD M. MARTIN, JR., M.D., et al,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant Lois Gholston appeals from the final judgment of the Supreme Court of Ohio, entered April 28, 1982, dismissing her appeal from the Tenth Judicial District Court of Appeals which asserts the unconstitutionality, under the 14th Amendment to the United States Constitution, of Ohio's malpractice statute of limitations, Ohio Revised

Code §2305.11(A), as applied by Ohio courts to bar her claim.

OPINIONS BELOW

The opinions of the Ohio Court of Appeals Tenth District (Case No. 81 AP-654, December 23, 1981) and the denial of the Motion to Certify by the Ohio Supreme Court (Case No. 82-301, April 28, 1982) are attached hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio, dismissing Mrs. Gholston's appeal from the Tenth Circuit Court of Appeal's dismissal of her suit due to the statute of limitations, was entered on April 28, 1982. See p. 14, infra. A notice of appeal to this Court was filed in the Supreme Court of Ohio on June 24, 1982. See p. 15 , infra. This case is being docketed in this Court within 90 days from the dismissal of appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether §2305.11 of the Ohio Revised Code is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States when, first, it denies an injured plaintiff access to state courts before she has, or could reasonably be expected to have, knowledge of her injury, and, second, when its application by the Ohio Supreme Court allows malpractice claims based on foreign objects left in the patient's body to accrue upon discovery of the object, while all other malpractice claims accrue at the later of the neglient act or the termination of the doctor-patient relationship.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment 14, states in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Ann. (Page) §2305.11(A) states in relevant part:

> An action for...malpractice against a physician, podiatrist, or a hospital...shall be brought within one year after the cause thereof accrued....

RAISING THE FEDERAL QUESTION

The Appellant has adequately discharged her burden of raising the federal question in the lower courts. Appellant expressly raised the claim that the application of the Ohio statute of limitations for medical malpractice claims in the instant case violates her rights to equal protection under the laws, due process of law, and access to the courts as protected by the Fourteenth Amendment to the United States Constitution. The Court of Appeals of Ohio declined to address the constitutional issues and affirmed the lower court's application of the statute. (Decision 81-AP-654, December 23, 1981.)

The Supreme Court of Ohio denied review of the constitutional question. (Case No. 82-301, April 28, 1982.)

STATEMENT OF THE CASE

Appellee Edward M. Martin, M.D. is a medical doctor licensed to practice in Ohio. On September 25, 1977 Appellee Lois Gholston came under the Appellee's care at the Ohio State University Hospital with complaints of a lump in her right breast. Appellee did a biopsy of the lump and made a diagnosis of low grade carcinoma or colloid tumor in

situ. The Appellee advised Mrs. Gholston that a radical mastectomy was required and removed her right breast in an operation at the Ohio State University Hospital on October 5, 1977. Mrs. Gholston's last visit to Dr. Martin was in September 1978.

On March 8, 1980 Mrs. Gholston was told by Dr. Brooks, a competent medical authority, that the radical mastectomy performed on her had been unnecessary, and that the colloid tumor in situ should have been excised without the removal of her breast.

After discovering the Appellee's negligence and malpractice, Mrs. Gholston filed suit against the Appellee on February 18, 1981 in the Common Pleas Court of Franklin County, Ohio, within one year of her discovery. Defendant-Appellee filed a motion to dismiss claiming the statute of limitations barred Appellant's claim because suit was commenced over one year after her last treatment by him, and therefore more than one year after the termination of the physician-patient relationship. On June 16, 1981 the trial court granted the Appellee's Motion to Dismiss, following the existing Ohio Supreme Court interpretation of the statute, Ohio Revised Code §2305.11.

The Court of Appeals of Ohio, Tenth Judicial District, affirmed the dismissal on December 23, 1981 (Case No. 81 AP-654). The Supreme Court of Ohio dismissed Mrs. Gholston's appeal on April 28, 1982 (Case No. 82-301.)

THE QUESTION IS SUBSTANTIAL

This case presents the substantial question of how far a state may proceed in its stated desire to reduce the number of malpractice suits in its jurisdiction before it violates the Due Process and Equal

Protection guarantees of the Fourteenth Amendment.

The present status of the applicable Ohio law is as follows. An action for medical malpractice is barred unless brought within one year after the cause thereof accrued. Ohio Revised Code §2305.11(A). The cause accrues when one of two events happens: either the act of malpractice or the termination of the physician-patient relationship, whichever is later. Wyler v. Tripi, 25 Ohio St.2d 164, 157 N.E.2d 419 (1971). As an exception the Ohio Supreme Court has adopted the rule that the cause accrues when a patient discovers a foreign object left in the body after surgery. Melnyk v. Cleveland Clinic Foundation, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972). The Ohio Supreme Court has refused to adopt a discovery rule in all other malpractice situations. Wyler, supra. It has refused to review cases proposing the discovery rule for other kinds of malpractice. Cunningham v. Mansfield General Hospital, Ohio App., 10th Dist., Case No. 80 AP-970, June 11, 1981, appeal dismissed (Ohio Supreme Court, Case No. 81-204, October 23, 1981); Gholston v. Martin, Ohio App., 10th Dist., Case No. 81 AP-654, December 23, 1981; appeal dismissed (Ohio Supreme Court, Case No. 82-301, April 28, 1982), (The instant case.)

Mrs. Gholston only discovered her injury one and one-half years after the termination of her doctor-patient relationship. She did, however, file her complaint within one year of her discovery. It is the barring of her claim even before she had any reasonable opportunity to know of it, much less begin litigation, that is the basis of the Due Process issue.

This Court has stated that a state has wide powers to preserve its citizens' ability to bring actions in state court, as a defendant's shelter under a statute of limitations is essentially a gift from the

state legislature. G.D. Searle & Co. v. Cohn, ___ U.S. ___, 50 U.S.L.W. 4243 (February 23, 1982). A state cannot be said to have the same leeway in restricting a citizen's ability to seek redress of wrongs in court, as her right of access is guaranteed by the Fourteenth Amendment. Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976); Payne v. Superior Court, 17 Ca.3d 908, 553 P.2d 565 (1976). Mrs. Gholston's claim must not be denied, as "the right of the litigant to be heard is one of the fundamental rights of due process of law. The denial of the right requires reversal." Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1964).

This Court has recognized that the Constitution places boundaries on statutes of limitation, as a "full opportunity" to litigate must be provided to all, or else the result "...would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." Wilson v. Iseminger, 185 U.S. 55, 62 (1905). The recent cases of Urie v. Thompson, 337 U.S. 163 (1949) and U.S. v. Kubrick, 444 U.S. 111 (1979), were cases interpreting federal statutes and did not resolve the issues presented here. Mrs. Gholston did not, and reasonably could not, appreciate the existence of her injury within the one year period set down by the legislature. Therefore her claim is barred before there is any reasonable opportunity to litigate it. The absurdity of extinguishing a claim before there is any chance to litigate makes the state's offer of judicial relief merely delusive, and therefore violates the Due Process Clause. The issue presented puts the statutory schemes of several states into doubt.

The application of the statute by the Supreme Court of Ohio presents a clear equal protection issue. In Wyler, supra, the court declared that malpractice claims accrue, at the latest, when the doctor-patient

relationship terminates. Yet in Melnyk, supra, the court constructed an exception, ruling that when a foreign object is left in a patient's body, the claim accrues upon discovery of the object, while all other malpractice claims are still under the Wyler rule. The Ohio Supreme Court has refused to extend the benefit of the discovery rule to malpractice plaintiffs whose claims are not based on foreign objects in the body. Cunningham, supra; Gholston, supra. Since the right to access is a fundamental right incorporated in the Fourteenth Amendment, "strict scrutiny" must apply and the distinction between claimants can be made only if it furthers a compelling state interest. Shapiro v. Thompson, 394 U.S. 618 (1969). There is no state interest present so compelling as to allow the arbitrary acceptance of foreign object claims and the rejection of all other malpractice claims.

Even if strict scrutiny is not adopted, the decisions of this Court have indicated that state imposed classifications which involved interests important to society must pass a level of scrutiny higher than a mere rational relationship between a legitimate state goal and the means used. Plymer v. Doe, ___ U.S. ___, 50 U.S.L.W. 4650 (June 15, 1982). Legislative decrees which usurp the judicial function should be viewd at this raised standard, as this Court has recognized that "regularized resolution of conflicts" is perhaps the most basic foundation of an organized and cohesive society. Boddie v. Connecticut, 401 U.S. 371 (1971). The statute at issue falls before such a test, as the distinction between claims involving a foreign object in the body and claims based on negligent diagnosis or treatment does not further the state goal of reducing claims well enough to justify the denial of equal access to

the similarly situated groups. Therefore, Mrs. Gholston cannot be denied her relief while another patient injured at the same time by a doctor's negligence is heard in court. The absence of any discernable difference between the claims presents a clear Fourteenth Amendment issue.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

July 23, 1982

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Lois Gholston,

Plaintiff-Appellant,

v.

No. 81AP-654

Edward W. Martin, M.D.,
aka Ted Martin, M.D., and
Charles I. Hecht, M.D., et al.,

Defendants-Appellees.

D E C I S I O N

Rendered on December 23, 1981

DUDA, ELK AND WOHL,
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For Plaintiff-Appellant.

PORTER, WRIGHT, MORRIS & ARTHUR,
MR. JOSEPH W. RYAN, JR., of Counsel,
37 West Broad Street,
Columbus, Ohio 43215,
For Defendant-Appellee,
Edward W. Martin, M.D.

ALEXANDER, EBINGER, FISHER,
McALISTER & LAWRENCE,
MR. THOMAS P. MICHAEL, of Counsel,
17 South High Street,
Columbus, Ohio 43215,
For Defendant-Appellee,
The Ohio State University Hospitals.

STRAUSBAUGH, P.J.

This is an appeal by plaintiff from a judgment in the Common Pleas Court granting defendant's motion to dismiss and finding that the statute of limitations bars plaintiff's claim.

The record indicates that, on Feburary 18, 1981, plaintiff filed her complaint against defendants alleging that:

> "5. On or about September 25, 1977 Plaintiff came under the care of Defendants with complaints of a lump in the right breast.
>
> "6. Defendants did a biopsy of said lump and made a diagnosis of low grade carsinoma or colloid tumor insitu.
>
> "7. Defendants negligently and improperly recommended to Plaintiff that she consent to the removal of her breast and misrepresented to Plaintiff that it was necessary to remove her breast.
>
> "8. On or about the 28th day of September, 1977 Defendants performed a radical masectomy removing Plaintiff's right breast.
>
> "9. Plaintiff states that the radical masectomy was unnecessary and was performed by the Defendants without her fully informed consent and constituted medical malpractice, fraud and misrepresentation.
>
> "10. Plaintiff continued under Defendant's care until about September of 1978.
>
> "11. Plaintiff did not know of the Defendants' negligence, malpractice, fraud and misrepresentation until her doctor requested her medical records from the Ohio State University Hospitals, when on or about March 8th, 1980 he informed the Plaintiff that the radical masectomy was unnecessary and was improperly performed."

The record further shows that defendant's answer set forth his first defense that plaintiff's claim against this defendant is barred

by the statute of limitations, R. C. 2305.11, requiring that an action for malpractice against a physician shall be brought within one year after the cause thereafter accrued.

The plaintiff states a single assignment of error:

> "The Trial court erred in granting defendants' motion to dismiss and determining that the Statute of Limitations bars the claim."

The Supreme Court held, in the syllabus, of Wyler v. Tripi (1971), 25 Ohio St. 2d 164:

> "Under R. C. 2305.11, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates. (Gillette v. Tucker, 67 Ohio St. 106; Bowers v. Santee, 99 Ohio St. 361; and DeLong v. Campbell, 157 Ohio St. 22, followed.)"

The Supreme Court, in Melnyk v. Cleveland Clinic (1972), 32 Ohio St. 2d 198, stated in the syllabus:

> "Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act. (Wyler v. Tripi * * * distinguished.)"

The plaintiff herein does not allege that this case involves the foreign object exception to the one-year statute of limitations.

Plaintiff argues against the law as set down by the Supreme Court in Wyler, supra, and states that a cause of action for malpractice should accrue and the statute commence to run from the time the patient discovers, or with due diligence, should have discovered his injury. However, this court does not have the power to modify or change the law as set forth by the Supreme Court. Plaintiff's cause of action accrued

upon the termination of the physician-patient relationship and her failure to bring her claim within the statutory time period forecloses her rights. If any change is to be made in the Ohio law relating to this question, it must be made by the Supreme Court. Plaintiff's single assignment of error is overruled and the judgment is affirmed.

Judgment affirmed.

McCORMAC and MOYER, JJ., concur.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Lois Gholston,	:	
Plaintiff-Appellant,	:	
v.	:	No. 81AP-654
Edward W. Martin, M.D., et al.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 23, 1981, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

STRAUSBAUGH, P. J., McCORMAC & MOYER, JJ.

By _____
Judge Dean Strausbaugh, P. J.

cc: John E. Duda
Joseph W. Ryan, Jr.
Thomas P. Michael

THOMAS J. ENRIGHT
CLERK OF COURTS
1981 DEC 23 PM 4:17

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 82 TERM

To wit: April 28, 1982

Lois Gholston,

Appellant,

vs.

Edward W. Martin et al.,

Appellees.

No. 82-301

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by John E. Duda

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

IN THE SUPREME COURT OF OHIO

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

Case No. 82-301

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Lois Gholston, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, overruling the motion to certify, entered in this action on April 28, 1982.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

FILED
JUN 24 1982
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed this 18th day of June, 1982, to Joseph J. Ryan, Jr., 37 West Broad Street, Columbus, Ohio 43215; and to Thomas P. Michael, 17 South High Street, Columbus, Ohio 43215.

JOHN E. DUDA

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SUPREME COURT OF THE UNITED STATES

Case No. 82 5100

October Term, 1982

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the Appellant, Lois Gholston, be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached Affidavit.

JOHN E. DUDA
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ATTORNEY FOR APPELLANT

STATE OF OHIO)
(SS: AFFIDAVIT
COUNTY OF CUYAHOGA)

I, LOIS GHOLSTON, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

My breast was removed by Dr. Martin at Ohio State University Hospitals on September 28, 1977. I did not discover that it was unnecessary for Dr. Martin to remove my breast until March 8, 1980, which was more than one year after Dr. Martin last treated me. On February 18, 1981 I brought suit against Dr. Martin and others, which was within one year after my discovery of their malpractice. The Ohio Courts have denied me redress on the ground that my suit is barred by the Ohio statute of limitations. I claim a denial of due process and equal protection of the laws afforded me by the U.S. Constitution.

Lois Gholston
LOIS GHOLSTON

Sworn to before me and subscribed in my presence this 24th day of May, 1982.

NOTARY PUBLIC

BRUCE E. DUDA, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date

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No. 82-5100

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Lois Gholston,

Appellant,

v.

Edward W. Martin, Jr., M.D., et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

Motion in the Alternative to Dismiss or Affirm

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Lois Gholston,

Appellant,

v.

Edward W. Martin, Jr., M.D., et al.,

Appellees.

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

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QUESTION PRESENTED

Whether the Appellant has been denied any federal right of due process or equal protection, where her medical malpractice claim against the Appellee was held to be barred because she neglected to sue within one year after the termination of her physician-patient relationship with the Appellee, and thus failed to comply with Ohio's statute of limitations for medical claims (Ohio Rev. Code Ann. Section 2305.11 (Page 1981), as interpreted by the Supreme Court of Ohio).

OPINIONS BELOW

The opinions below are adequately referred to in the Appellant's Jurisdictional Statement, and copies of the opinions are attached thereto.

JURISDICTION

The grounds upon which this Court's jurisdiction is invoked are set forth in the Appellant's Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Constitutional and statutory provisions are set forth in the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Ohio's statute of limitations for medical malpractice claims requires that a medical malpractice plaintiff bring suit within one year after accrual of the cause of action. See Ohio Rev. Code Ann. Section 2305.11(A) (Page 1981). By judicial decision, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship terminates. See Wyler v. Tripi, 25 Ohio St.2d 164, 267 N.E.2d 419 (syllabus) (1971). Also by judicial decision, in cases where the physician's negligence involves merely the leaving of a foreign object in the patient's body, the statute of limitations is tolled until the patient discovers or reasonably should have discovered the negligent act. See Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 201, 290 N.E.2d 916, 918 (1972).

The precise date on which the physician-patient relationship terminated here is not settled. But even by Appellant's account, she failed to bring suit until two-and-one-half years had elapsed

after the termination of the Appellee's professional relationship with her -- well beyond the one-year period provided to her by statute. Appellant's claim arose from an extended simple mastectomy that occurred on September 28, 1977. After the Appellee had diagnosed that she was suffering from breast cancer and discussed with her the laboratory findings that provided the basis of his diagnosis, he performed the operation. The post-operative period was uneventful. It is undisputed that Appellant did have carcinoma of the breast.

Several years later, another doctor allegedly told Appellant that her entire breast need not have been removed. After another eleven months, she filed this suit. Her claim has been rejected on three separate instances by the courts of Ohio, because the statute of limitations has run with respect to her claim.

ARGUMENT

I. OHIO REVISED CODE SECTION 2305.11 AND ITS FOREIGN OBJECT EXCEPTION ARE REASONABLE AND THUS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Within the past twelve years, this Court has twice declined to hear equal protection challenges to medical malpractice statutes of limitations. See Woodward v. Burnham City Hospital, 449 U.S. 807 (1980), dismissing appeal from Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979); Clark v. Gulesian, 400 U.S. 993 (1971), denying cert. to 429 F.2d 405 (1st Cir. 1970). The challenged distinction in both cases was that between medical malpractice plaintiffs as a group and all other tort plaintiffs, to whom longer limitations periods were available.[1] Appellant here, however, attacks the distinction in Ohio law between foreign object plaintiffs and other medical malpractice plaintiffs for purposes of determining when the cause of action accrues.

---

[1] A number of other recent cases have involved equal protection challenges, after the plaintiff's claim has been held to be time-barred, to medical malpractice statutes of limitations. No courts have struck down the statutes, however. See Botzet v. Spencer, 362 F.Supp. 177 (D. Minn. 1973) (claim based on contract and arising out of an operation for plaintiff's

As noted in the Statement of the Case, the cause of action in a medical malpractice claim in Ohio accrues for a foreign object plaintiff at the time of discovery (or when the foreign object reasonably should have been discovered). For all other medical malpractice plaintiffs, however, the cause of action accrues at the termination of the physician-patient relationship. In either situation, suit must be filed within four years after the date of the negligent act or omission giving rise to the claim. See Ohio Rev. Code Ann. §2305.11(B) (Page 1981). Appellant does not challenge this four-year limit.

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varicose veins; court rejected equal protection challenge to distinction between medical contract cases and other contract cases with respect to limitations period); Stephens v. Snyder Clinic Association, 230 Kan. 115, ____, 631 P.2d 222, 234 (1981) (claim based on negligent insertion of IUD; court rejected equal protection challenge to distinction between medical malpractice and other tort claims, with respect to limitations period); Mishek v. Stanton, 616 P.2d 135, 139 (Colo. 1980) (claim based on negligent administration of medication during childbirth; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Johnson v. St. Vincent Hospital, 404 N.E.2d 585, 603 (Ind. 1980) (consolidated cases involving claims arising out of tonsillectomy, hysterectomy, eye treatment, and general hospital treatment; court rejected equal protection challenge to distinction between medical malpractice and other tort plaintiffs, with respect to accrual date and tolling provisions); Hamby v. Neurological Associates, 243 Ga. 698, 256 S.E.2d 378 (1979) (medical malpractice claim for loss of consortium; court rejected equal protection challenge to distinction between medical malpractice and other tort claims, with respect to limitations period); Sellers v. Edwards, 289 Ala. 2, 6, 265 So.2d 438, 440-41 (1972) (claim based on a bulldog-clamp left in plaintiff's body; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Laughlin v. Forgrave, 432 S.W.2d 308, 314-15 (Mo. 1968) (claim based on rubber dam left in back; court rejected equal protection challenge to distinction between medical malpractice and other tort plaintiffs, with respect to limitations period); Roberts v. Durham County Hospital, ____ N.C. App. ____, ____, 289 S.E.2d 875, 878-79 (N.C. Ct. App. 1982) (claim based on intravenous catheter pieces left in plaintiff's arm; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 696-97, 565 P.2d 435, 437 (Wash. Ct. App. 1977) (undetailed medical malpractice claim; court rejected equal protection challenge to distinction between malpracticing health-care providers and other tortfeasors); Landgraff v. Wagner, 26 Ariz. App. 49, 55, 546 P.2d 26, 31-32 (Ariz. Ct. App. 1976), appeal dismissed, 429 U.S. 806 (1976), (claim based on surgical clamp left in plaintiff's abdomen; court rejected equal protection challenge to distinction between health-care providers and other tortfeasors, with respect to limitations period) (appeal dismissed for want of jurisdiction).

The proper test for determining the validity of distinctions drawn by statutes of limitations, when challenged on equal protection grounds, is whether the distinctions are reasonable. See, e.g., Johnson v. St. Vincent Hospital, 404 N.E.2d 585, 600 (Ind. 1980); Ross v. Kansas City General Hospital, 608 S.W.2d 397, 399 (Mo. 1980); Roberts v. Durham County Hospital, ____ N.C. App. ____, ____, 389 S.E.2d 875, 878-79 (rejecting strict scrutiny).

The Ohio Supreme Court has ably enumerated several reasons for applying the discovery rule in foreign-object cases: the absence of the typical "stale claims" problems of proof that accompany other medical malpractice claims, see Melnyk v. Cleveland Clinic, Inc., supra, at 200 n.5, 290 N.E.2d at 917 n.5; and the "pressures associated with modern surgeon-patient relationships," Melnyk, supra, at 202, 290 N.E.2d at 918. After balancing the policy considerations involved, the Ohio Supreme Court announced in Melnyk that the cause of action in foreign object cases accrues from the date of discovery, rather than the date of termination of the physician-patient relationship that applies to other medical malpractice claims. Melnyk, supra, at 201, 290 N.E.2d at 918.

Recent case law uniformly upholds foreign object exceptions such as that challenged here against equal protection attacks. The decisions also uphold statutes of limitations that treat medical malpractice plaintiffs in general differently from other tort plaintiffs.

In 1980, for example, the Missouri Supreme Court sustained, against a federal equal protection challenge, distinctions identical to those that Appellant complains about here. Ross v. Kansas City General Hospital, supra, at 399. The plaintiff in Ross suffered an allegedly negligently performed tubal ligation, which negligence resulted in her subsequent pregnancy. The Missouri courts held that her claim was barred by Missouri's statute of limitations for medical malpractice claims. The plaintiff attacked the Missouri statute on the ground that, inter alia, the distinctions that the statute drew between different

types of medical malpractice claimants violated the federal equal protection clause. She contended that it was unreasonable for the accrual date for foreign object claims to be the date of discovery, while for other medical malpractice claims such as the plaintiff's, the claim accrued from the date of the negligent act or omission. See Ross, supra, at 398.

The Missouri Supreme Court applied the rational basis test to her argument. It then imputed two reasons behind the distinction to the Missouri legislature: first, a special unfairness in barring foreign object plaintiffs; and second, fewer problems with stale evidence in foreign object cases. See Ross, supra, at 399. The court then unanimously held that the distinction did not violate Fourteenth Amendment equal protection guarantees.

The reasoning in Ross is sound. It leads directly to the appropriate conclusion here: Ohio's foreign object exception is reasonable, and thus withstands Appellant's equal protection objections.

II. THE ACCRUAL DATE AND ONE-YEAR PERIOD FOR BRINGING MEDICAL MALPRACTICE SUITS, AS ESTABLISHED IN SECTION 2305.11, IS A REASONABLE POLICY DECISION, BALANCING OHIO'S INTEREST IN DISCOURAGING STALE CLAIMS AND PROMOTING QUALITY HEALTH CARE WITH PLAINTIFFS' INTEREST IN RECOVERING DAMAGES FOR INJURIES NEGLIGENTLY INFLICTED UPON THEM, AND THUS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has twice declined over the past twelve years to hear due process challenges to medical malpractice statutes of limitations. See Woodward, supra p.2; Clark, supra p.2. In Woodward, the challenged provision of the statute placed a limit of four years from the date of the negligent act or omission on medical malpractice claims. See Anderson v. Wagner, 79 Ill.2d 295, 312, 402 N.E.2d 560,568 (1980), appeal dismissed sub nom. Woodward v. Burnham City Hospital, 449 U.S. 807 (1980). In Clark, the period was even shorter: two years from the date of the negligent act or omission. See Clark v. Gulesian, 429 F.2d 405, 406 (1st Cir. 1970), cert. denied, 400 U.S. 993 (1971).

Statutes such as that upheld in Clark may operate more harshly upon medical malpractice plaintiffs than Ohio's

limitation scheme, even though the period in Clark was two years while the period in Ohio is one year. This potential for greater harshness is due to the difference in accrual dates: under statutes such as that in Clark, the cause of action accrues from the date of the negligent act or omission, whereas in Ohio the cause of action may accrue -- as it did in Appellant's situation -- as late as the termination of the physician-patient relationship. So long as the relationship terminates more than one year after the negligent act, the plaintiff under Ohio law will have had a total of more than two years from the date of the negligent act during which to discover the malpractice, versus only two years under statutes such as that in Clark. Thus, in Clark this Court declined to hear a challenge to a medical malpractice statute of limitations that often operates more harshly than the Ohio statute. The Court should likewise decline to hear Appellant's challenge here.

Although Ohio's statute of limitations may in some cases operate harshly by precluding the claims of plaintiffs who did not discover -- and reasonably could not have discovered -- their injury before the statute has run, it does not therefore deny due process. For example, in Anderson v. Wagner, supra p.5, one of the plaintiffs underwent amputation on both legs and also developed cataracts, due to massive steroid treatments that he received after an erroneous tissue diagnosis. See Anderson, at 300, 402 N.E.2d at 562. After the statute had run, a new diagnosis performed on tissue preserved from the first test showed that the earlier diagnosis was incorrect. The court recognized that:

> Although such a result - a cause of action barred before its discovery - seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish. Id. at 312, 402 N.E.2d at 568.

The court went on to find no violation of plaintiff's right to due process.

The facts were equally compelling in Clark, supra p.2. The plaintiff had suffered intestinal problems and general ill

health for eighteen years, due to a towel left in his abdominal cavity. The towel had been left there during an operation that the defendant had performed. A unanimous First Circuit panel, speaking through then-Chief Judge Aldrich, observed that:

> Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Clark, supra, at 406.

The court proceeded to uphold the statute.

A number of other courts have likewise held that, while a medical malpractice statute of limitations may preclude some plaintiffs from recovering damages before they reasonably can discover that they have a claim, the statute does not therefore violate federal due process guarantees.[2] Indeed, there is no good case law holding medical malpractice statutes of limitations unconstitutional on due process grounds.[3]

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[2] See, e.g., Stephens, supra n.1, at ____, 631 P.2d at 236 (four-year statute, accruing from date of negligent act/omission, barred claim based on an IUD becoming buried in plaintiff's uterine wall; the IUD was not discovered until a hysterectomy was required after the statute had run); Owen v. Wilson, 260 Ark. 21, 25, 537 S.W.2d 543, 545 (1976) (two-year statute, accruing from date of negligent act/omission, barred claim based on surgical instrument left in plaintiff's body; the instrument was not discovered until after the statute had run); Laughlin, supra n.1, at 314 (two-year statute, accruing from date of negligent act/omission, barred claim based on rubber dam left in plaintiff's back; the rubber dam was not discovered until after the statute had run, even though the plaintiff had seen seven different doctors to treat her back pains); Carmichael v. Silbert, 422 N.E.2d 1330, 1333 (Ind. App. 1981) (two year statute, accruing from date of negligent act/omission, barred malpractice claim; plaintiff discovered the negligence within the period, but the court analyzed the due process challenge recognizing that the statute could bar some claims before plaintiffs knew about the negligence causing their injury); Landgraff v. Wagner, 26 Ariz. App. 49, 54-55, 546 P.2d 26, 31-32 (Ariz. Ct. App. 1976), appeal dismissed, 429 U.S. 806 (1976) (six-year statute, accruing from date of negligent act/omission, barred claim based on a six-inch surgical clamp left in plaintiff's body; the clamp was not discovered until after the statute had run) (appeal dismissed for lack of jurisdiction).

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[3] In addition to the two cases discussed in the text and the five cases cited in note 2, courts in several other cases have addressed federal due process challenges to medical malpractice statutes of limitation; in every case, the court rejected the challenge. See Mishek, supra n.1, at 138; Johnson, supra n.1, at 603-04; Ross, supra p.4, at 400.

Statutes of limitations are by nature arbitrary and thus occasionally harsh. But as this Court noted in Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945), establishing statutes of limitations is a valid exercise of legislative prerogative, based on public policy considerations:

> Statutes of limitation find their justification in necessity and convenience rather than in logic.... They have come into the law not through the judicial process but through legislation. They represent a public policy decision about the privilege to litigate. Chase Securities Corp. v. Donaldson, supra, at 314.

Ohio's one-year statute and its accrual upon the termination of the physician-patient relationship represents a legislative decision resolving competing policy considerations. On the one hand is the policy of giving patients who are negligently injured by health-care providers a fair opportunity to recover their damages; on the other hand is the policy of discouraging stale claims, with their attendant problems of absence of witnesses, failure of memory, and so forth. See Wyler v. Tripi, 25 Ohio St.2d 160, 166, 267 N.E.2d 419, 420 (1971). The Ohio Supreme Court, in refusing to adopt a discovery rule for the accrual of medical malpractice causes of action, recognized that the Ohio legislature has manifested its preference for the termination rule -- and the policy decisions it embodies -- over the discovery rule. Wyler v. Tripi, supra, at 170-72, 267 N.E.2d at 423-24. The court thus properly deferred to the legislative judgment in this pragmatic, policy-laden area.

The Ohio legislature itself has more recently articulated another important policy consideration behind the state's statute of limitations for medical malpractice claims: assuring an adequate supply of good health care to Ohio's citizens. In leaving the termination rule for accrual undisturbed and imposing upon all medical malpractice claims a four-year limit from the date of the negligent act or omission, the Legislature declared that "immediate action is necessary to ensure a continuance of health care delivery to the citizens of Ohio." Am. Sub. H.B. No. 682, 1975-76 Ohio Laws 2809, 2843-44. Assuring good health care

to the public has been explicitly recognized as a basis for special medical malpractice statutes of limitations by a number of courts around the nation as well as by the Ohio Legislature. See, e.g., Anderson, supra p.5, at 301-09, 402 N.E.2d at 562-66 (extended discussion of the "malpractice crisis" and legislative responses to it).

Thus, Ohio's statute of limitations for medical malpractice claims represents a reasonable legislative decision resolving a variety of competing policy considerations. One year from the termination of the physician-patient relationship offers medical malpractice plaintiffs as a group a fair opportunity to litigate, at the same time that it discourages stale claims and promotes the quality of health care for the people of Ohio.

CONCLUSION

As demonstated in the foregoing argument, Ohio's medical malpractice statute of limitations, Ohio Rev. Code Ann. §2305.11, does not violate either the equal protection or the due process clause of the Fourteenth Amendment of the United States Constitution. Appellant's position has been frequently propounded and uniformly held to be without merit. Appellant's contentions present no substantial federal question, and Appellee's motion to dismiss the appeal should therefore be sustained.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion in the Alternative to Dismiss or Affirm was served upon John E. Duda, Attorney for Appellant, at 800 Bond Court Building, Cleveland, Ohio 44114; and to Thomas P. Michael, at 17 South High Street, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 24th day of August, 1982.

James S. Monahan

James S. Monahan